U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 12 January 2007

CASE NO.: 2005-BLA-6134

In the Matter of:

J.N. On Behalf of J.W.N.,
Claimant

v.

VALLEY CAMP COAL CO.,
Employer

And

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-in-Interest

Appearances:

Otis R. Mann, Jr., Esq.,
For the Claimant

Christopher M. Hunter, Esq.,
For the Employer

Jeffrey S. Goldberg, Esq.,
For the Director

Before: RICHARD A. MORGAN
Administrative Law Judge

DECISION AND ORDER DENYING BENEFITS

This proceeding arises from a now deceased miner's claim for benefits, under the Black Lung Benefits Act, 30 U.S.C. § 901 *et seq*., as amended ("Act"), filed on July 29, 2004. The Act and implementing regulations, 20 C.F.R. parts 410, 718, and 727 ("Regulations"), provide compensation and other benefits to:

1. Living coal miners who are totally disabled due to pneumoconiosis and their dependents;

2. Surviving dependents of coal miners whose death was due to pneumoconiosis; and,

3. Surviving dependents of coal miners who were totally disabled due to pneumoconiosis at the time of their death.

The Act and Regulations define pneumoconiosis ("black lung disease" or "coal worker's pneumoconiosis" ("CWP")) as a chronic dust disease of the lungs and its sequelae, including respiratory and pulmonary impairments arising out of coal mine employment.

PROCEDURAL HISTORY

The claimant filed his claim for benefits on July 29, 2004. (Director's Exhibit ("DX") 2). The claim was denied by the district director because the evidence failed to establish the elements of entitlement. (DX 21). The miner died on January 18, 2005. On April 20, 2005, the claimant's counsel requested a hearing before an administrative law judge. On July 1, 2005, the case was referred to the Office of Administrative Law Judges by the Director, Office of Workers' Compensation Program (OWCP) for a formal hearing. (DX 29). I was assigned the case on February 17, 2006.

On July 11, 2006, I held a hearing in Charleston, West Virginia, at which the claimant, employer, and insurer were represented by counsel.[1] No appearance was entered at the hearing for the Director, OWCP; however, as described below, the Director has since submitted a brief addressing evidentiary issues. The parties were afforded the full opportunity to present evidence and argument. Claimant's exhibits ("CX") 1-5, Director's exhibits ("DX") 1-31, and Employer's exhibits ("EX") 1-7 were admitted into the record.[2] EX 8 and EX 9, two re-readings of an X-ray dated 8/7/03, offered for "good cause" were not admitted as no good cause was established.

After several enlargements of time, the parties submitted final briefs, on October 25, 2006. After another extension, the Director submitted an argument concerning the admission of X-ray evidence on December 13, 2006.

ISSUES

I. Whether the miner had pneumoconiosis as defined by the Act and the Regulations?

II. Whether the miner's pneumoconiosis arose out of his coal mine employment?

III. Whether the miner was totally disabled?

[1] Under *Shupe v. Director, OWCP*, 12 B.L.R. 1-200, 1-202 (1998)(*en banc*), the location of a miner's last coal mine employment, i.e., here the state in which the hearing was held, is determinative of the circuit court's jurisdiction.
[2] DX 12, Dr. Wheeler's "negative" reading of the 9/30/04 DOL X-ray, offered as rebuttal by the employer, was admitted.

IV. Whether the miner's disability was due to pneumoconiosis?

V. Whether the miner had any dependents for purposes of augmentation of benefits?

FINDINGS OF FACT

I. Background

A. Coal Miner[3]

The claimant was a coal miner, within the meaning of § 402(d) of the Act and § 725.202 of the Regulations,[4] for at least fourteen years. (DX 3, 5).[5]

B. Date of Filing[6]

The miner filed his claim for benefits, under the Act, on July 29, 2004. (DX 2). None of the Act's filing time limitations are applicable; thus, the claim was timely filed.

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[3] Former subsection 718.301(a) provided that regular coal mine employment may be established on the basis of any evidence presented, including the testimony of a claimant or other witnesses and shall not be contingent upon a finding of a specific number of days of employment within a given period. 20 C.F.R. § 718.301 now provides that it must be computed as provided by § 725.101(a)(32). The claimant bears the burden of establishing the length of coal mine employment. *Shelesky v. Director, OWCP*, 7 B.L.R. 1-34 (1984). Any reasonable method of computation, supported by substantial evidence, is sufficient to sustain a finding concerning the length of coal mine employment. *See Croucher v. Director, OWCP,* 20 B.L.R. 1-67, 1-72 (1996)(en banc); *Dawson v. Old Ben Coal Co*., 11 B.L.R. 1-58, 1-60 (1988); *Vickery v. Director, OWCP*, 8 B.L.R. 1-430, 1-432 (1986); *Niccoli v. Director, OWCP*, 6 B.L.R. 1-910, 1-912 (1984).

[4] § 725.202 Miner defined; condition of entitlement, miner (Applicable to adjudications on or after Jan. 19, 2001).

> (a) Miner defined. A "miner" for the purposes of this part is any person who works or has worked in or around a coal mine or coal preparation facility in the extraction, preparation, or transportation of coal, and any person who works or has worked in coal mine construction or maintenance in or around a coal mine or coal preparation facility. There shall be a rebuttable presumption that any person working in or around a coal mine or coal preparation facility is a miner. This presumption may be rebutted by proof that:
>
> (1) The person was not engaged in the extraction, preparation or transportation of coal while working at the mine site, or in maintenance or construction of the mine site; or
>
> (2) The individual was not regularly employed in or around a coal mine or coal preparation facility.

(emphasis added).

[5] Where there is more than one operator for whom the claimant worked a cumulative total of at least one year, 20 C.F.R. § 725.493(a)(1) imposes liability on the most recent employer. *Snedecker v. Island Creek Coal Co.,* 5 B.L.R. 1-91 (1982)(§ 725.495(a) for claims filed on or after Jan. 19, 2001). One year of coal mine employment may be established by accumulating intermittent periods of coal mine employment. 20 C.F.R. § 725.493(c)) (See § 725.101(32) for adjudications on or after Jan. 19, 2001). Under 718.301 (effective Jan. 19, 2001), the length of coal mine employment "must" be computed under 725.101(a)(32) criteria.

[6] 20 C.F.R. § 725.308 (Black Lung Benefits Act as amended, 30 U.S.C.A. §§ 901-945, § 422(f)).

> (a) A claim for benefits filed under this part by, or on behalf of, a miner shall be filed within three years after a medical determination of total disability due to pneumoconiosis which has been communicated to the miner or a person responsible for the care of the miner…
>
> (c) There shall be a rebuttable presumption that every claim for benefits is timely field…the time limits in this section are mandatory and may not be waived or tolled except upon a showing of extraordinary circumstances.

C. Responsible Operator[7]

Valley Camp Coal Company is the last employer for whom the claimant worked a cumulative period of at least one year and is the properly designated responsible coal mine operator in this case, under Subpart G, Part 725 of the Regulations.[8]

The insurance policy or contract of each non-self-insured operator must contain a provision that insolvency or bankruptcy of the operator or discharge or both "shall not relieve the carrier from liability" to pay benefits. 20 C.F.R. § 726.204(b).

D. Dependents

The claimant had one dependent for purposes of augmentation of benefits under the Act, his wife. (DX 2, 8).

E. Personal, Employment and Smoking History[9]

The decedent miner was born on May 27, 1943. (DX 2). The Miner's last position in the coal mines was that of a welder. (DX 3).

The claimant, as part of his duties, was required to perform construction maintenance, upkeep the plant, perform outside construction, paint, and weld. He had to lift, carry, crawl, sit, and stand all day. (DX 4).

There is evidence of record that the Miner's respiratory disability is due, in part, to his history of cigarette smoking. The evidence is fairly consistent concerning the miner's lengthy smoking history. Medical records show a 45-year smoking history ending in 2000. (EX 1).

The miner worked for the West Virginia Department of Highways, as a maintenance/craft worker, from September 1987 until June 23, 2003 when he took a leave of absence due to an injury. (DX 2, 3). He began receiving Social Security Disability payments for his back and leg injuries. (DX 4).

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[7] Liability for payment of benefits to eligible miners and their survivors rests with the responsible operator, or if the responsible operator is unknown or is unable to pay benefits, with the Black Lung Disability Trust Fund. 20 C.F.R. § 725.493(a)(1) defines responsible operator as the claimant's last coal mine employer with whom he had the most recent cumulative employment of not less than one year.

[8] 20 C.F.R. § 725.492. The terms "operator" and "responsible operator" are defined in 20 C.F.R. §§ 725.491 and 725.492. The regulations provide two rebuttable presumptions to support a finding the employer is liable for benefits: (1) a presumption that the miner was regularly and continuously exposed to coal dust; and (2) a presumption that the miner's pneumoconiosis **(disability or death and not pneumoconiosis for claims filed on or after Jan. 19, 2001)** arose out of his employment with the operator. 20 C.F.R. §§ 725.492(c) and 725.493(a)(6) (§§ 725.491(d) and 725.494(a) for claims filed on or after Jan. 19, 2001). To rebut the first, the employer must establish that there were no significant periods of coal dust exposure. *Conley v. Roberts and Schaefer Coal Co.*, 7 B.L.R. 1-309 (1984); *Richard v. C & K Coal Co.*, 7 B.L.R. 1-372 (1984); *Zamski v. Consolidation Coal Co.*, 2 B.L.R. 1-1005 (1980). To rebut the second, the operator must prove "within reasonable medical certainty or at least probability by means of fact and/or expert opinion based thereon that the claimant's exposure to coal dust in his operation, at whatever level, did not result in, or contribute to, the disease." *Zamski v. Consolidation Coal Co.,* 2 B.L.R. 1-1005 (1980). The second presumption has been rebutted in this case.

[9] "The BLBA, judicial precedent, and the program regulations do not permit an award based solely upon smoking-induced disability." 65 Fed. Reg. 79948, No. 245 (Dec. 20, 2000).

II. Medical Evidence[10]

A. Chest X-rays[11]

Admitted are three readings of one X-ray, taken on 9/30/04.[12] All three of the readings are properly classified for pneumoconiosis, pursuant to 20 C.F.R. § 718.102(b).[13] Two readings are positive, by Drs. Gaziano and Miller, who are Board-certified in radiology and/or B-readers or both.[14] One is negative, by Dr. Wheeler who is a B-reader and Board-certified in radiology.[15] Drs. Wheeler and Wiot are professors of radiology. Dr. Wiot is a B-reader and Board-certified in radiology.

Exh. #	Dates: 1. X-ray 2. read	Reading Physician	Qualific-ations	Film Quality	ILO Classification	Interpretation Or Impression
DX 11	9/30/04 9/30/04	Gaziano	B	1	1/0, q/q	Dr. Binns finds quality acceptable.
CX 1	9/30/04 5/30/05	Miller	B; BCR		1/1, p/q	
DX 12	9/30/04 1/28/05	Wheeler	B; BCR	2	Negative	Mass, left hilum c/I cancer or inflammatory LD.
EX 1	8/7/03	Reifsteck			Hospital record not ILO reading	Density, right mid lung may be gran-uloma. No acute infiltrates.

* A-A-reader; B-B-Reader; BCR – Board Certified Radiologist; BCP – Board-certified pulmonologist; BCI – Board-certified internal medicine; BCI(P) – Board-certified internal

[10] *Dempsey v. Sewell Coal Co. & Director, OWCP,* 23 B.L.R. 1-47, BRB Nos. 03-0615 BLA and 03-0615 BLA-A (June 28, 2004)(*en banc*). BRB upheld regulatory limitations on the admissibility of medical evidence, under the new 2001 regulations, i.e., 20 C.F.R. Sections 725.414 and 725.456(b)(1).

[11] In the absence of evidence to the contrary, compliance with the requirements of Appendix A shall be presumed. 20 C.F.R. § 718.102(e)(effective Jan. 19, 2001).

[12] *Mosley v. Eastern Associated Coal Corp*., BRB No. 05-0720 (April 27, 2006)(Unpublished). Where claimant could not show how the result would change, it was not error for the judge to consider the totality of the X-ray evidence without first determining whether each separate film was positive or negative. Here, the judge found much of the recent X-ray evidence in equipoise.

[13] ILO-UICC/Cincinnati classification of Pneumoconiosis – The most widely used system for the classification and interpretation of X-rays for the disease pneumoconiosis. This classification scheme was originally devised by the International Labor Organization (ILO) in 1958 and refined by the International Union Against Cancer (UICQ) in 1964. The scheme identifies six categories of pneumoconiosis based on type, profusion, and extent of opacities in the lungs.

[14] *LaBelle Processing Co. v. Swarrow,* 72 F.3d 308 (3rd Cir. 1995) at 310, n. 3. "A "B-reader" is a physician, often a radiologist, who has demonstrated proficiency in reading X-rays for pneumoconiosis by passing annually an examination established by the National Institute of Safety and Health and administered by the U.S. Department of Health and Human Services. *See* 20 C.F.R. § 718.202(a)(1)(ii)(E); 42 C.F.R. § 37.51. Courts generally give greater weight to X-ray readings performed by "B-readers." *See Mullins Coal Co. v. Director, OWCP*, 484 U.S. 135, 145 n. 16, 108 S.Ct. 427, 433 n. 16, 98 L.Ed. 2d 450 (1987); *Old Ben Coal Co. v. Battram*, 7 F.3d 1273, 1276 n. 2 (7th Cir. 1993)."

[15] *Cranor v. Peabody Coal Co.,* 21 B.L.R.1-201, BRB No. 97-1668 (Oct. 29, 1999) *on recon*. 22 B.L.R. 1-1 (Oct. 29, 1999)(*En banc*). Judge did not err considering a physician's X-ray interpretation "as positive for the existence of pneumoconiosis pursuant to Section 718.202(a)(1) without considering the doctor's comment." The doctor reported the category I pneumoconiosis found on X-ray was not CWP. The Board finds this comment "merely addresses the source of the diagnosed pneumoconiosis (& must be addressed under 20 C.F.R. § 718.203, causation)."

medicine with pulmonary medicine sub-specialty. Readers who are Board-certified radiologists and/or B-readers are classified as the most qualified. *See Mullins Coal Co. v. Director, OWCP,* 484 U.S. 135, 145 n. 16, 108 S.Ct. 427, 433 n. 16, 98 L.Ed. 2d 450 (1987), *Old Ben Coal Co. v. Battram,* 7 F.3d 1273, 1276 n. 2 (7th Cir. 1993), and *Zeigler Co. v. Kelley*, 112 F.3d 839, 842-843 (7th Cir. 1997). B-readers need not be radiologists. *Cannelton Industries, Inc. v. Director, OWCP[Frye],* Case No. 03-1232 (4th Cir. April 5, 2004)(Proper to accord more weight to radiologists' readings over non-radiologists). *Bethenergy Mines, Inc., v. Cunningham*, Case No. 03-1561 (4th Cir. July 20, 2004)(Unpub.)(Appropriate to accord greater weight to the x-ray interpretation of a dually-qualified reader over a B-reader).

**The existence of pneumoconiosis may be established by chest X-rays classified as category 1, 2, 3, A, B, or C according to ILO-U/C International Classification of Radiographs. A chest X-ray classified as category "0," including subcategories "0/-, 0/0, 0/1," does not constitute evidence of pneumoconiosis. 20 C.F.R. § 718.102(b). In some instances, it is proper for the judge to infer a negative interpretation where the reading does not mention the presence of pneumoconiosis. *Yeager v. Bethlehem Mines Corp*., 6 B.L.R. 1-307 (1983) (Under Part 727 of the Regulations) and *Billings v. Harlan #4 Coal Co.*, BRB No. 94-3721 (June 19, 1997)(*en banc)(Unpublished)*. If no categories are chosen, in box 2B(c) of the X-ray form, then the x-ray report is not classified according to the standards adopted by the regulations and cannot, therefore, support a finding of pneumoconiosis.

The admission of X-ray evidence was discussed at the hearing. On July 21, 2006, I also conducted a conference telephone call with the employer and claimant concerning the matter. Although I did not explicitly report the details of the call, every matter brought up in the call was reflected in my nine-page Ruling and Order Delineating, Excluding and Admitting X-ray Readings Addressing Director's X-ray Reading (hereinafter "Ruling and Order") of July 28, 2006. Moreover, that Order invited all the parties, including the Director, to address the evidentiary matters in their final briefs, due August 31, 2006. That deadline was enlarged to September 25, 2006, at the Claimant's request. It was further enlarged at the Director's request, until October 25, 2006. Rather than submit a brief, the Director submitted a motion for further information and delay, on October 25, 2006, which was not approved, because it was not received by the undersigned. Both the employer and claimant submitted briefs by the deadline. The Director was given additional time, with the agreement of the remaining parties, to address the evidence issues. The Director submitted a brief on December 13, 2006.

Since the date of the hearing and my Ruling and Order, the Benefits Review Board ("BRB" or "Board") issued *Sprague v. Freeman Coal Mining Co*., BRB No. 05-1020 BLA (Aug. 31, 2006)(Unpub.)(arising in 7th Cir.). Acceding to the Director's "reasonable interpretation" of the Regulations, the Board found that the "rebuttal" evidence submitted by a party, 20 C.F.R. section 725.414(a)(2)(ii) and (a)(3)(ii), "need not contradict the specific item of evidence to which it is responsive, but rather, need only refute 'the case' presented by the opposing party. Thus, it would have allowed the claimant to "rebut" the Director's positive X-ray reading with a positive reading of his own. Moreover, under *Ward v. Consolidation Coal Co.*, 23 B.L.R. 1-151, BRB No. 05-0595 BLA (Mar. 28, 2005), each party submits X-ray "interpretations" which the other may rebut with "interpretations."

Although I disagree with the Board's holding in *Sprague* for the reasons I detailed, in my Ruling and Order, and recognize it was unpublished, I am nevertheless compelled to follow it. The Employer argues that the holding lacks value as a precedent and is "illogical and contrary to the plain language of the regulations." (Employer's Brief at page 4). However, given the Board's

direction, CX 1, the Claimant's "1/1" reading by Dr. Miller, must be admitted as "rebuttal" to the "1/0" DOL X-ray reading by Dr. Gaziano.

However, the Board has not ruled on whether an employer rereading of the DOL X-ray may be submitted as one of the employer's two affirmative X-ray readings, under 20 C.F.R. section 725.414. I need not address whether a claimant may submit a supportive rereading of the DOL X-ray as one of its "affirmative" X-ray readings since I admitted CX 1 as direct rebuttal to the DOL X-ray reading.

The Employer argues that had the drafters wished to preclude submission of rereadings of the DOL X-ray as "affirmative" evidence they would have so stated, but did not. Additionally, the Director argues that § 725.414 does not limit the source of the readings offered in support of a party's affirmative case. Therefore, the Director does not believe that submitting a reread of the DOL X-ray as affirmative evidence runs afoul of the evidentiary limitations. Thus, the Director supports the admission of Dr. Scott's rereading of the DOL X-ray as Employer's affirmative evidence.

As I reasoned, in my Ruling and Order, admission of an employer rereading of the DOL X-ray submitted as one of the employer's two affirmative X-ray readings would contravene the carefully crafted limitations on evidence, set forth in 20 C.F.R. section 725.414, and create an unintended adverse domino effect. If permitted, the opposing party would then be entitled to submit "rebuttal" of the same. Thus, contrary to the regulatory scheme that opposing party would have two, rather than one, rebuttals of the DOL X-ray reading. Then the former party must be allowed further "rehabilitation" by means of an additional statement from the "physician who originally interpreted the chest X-ray." Which doctor is that- the original DOL reader or the party's own reader who reread the DOL X-ray? In any case, such a detour from the plain language of the regulation would allow for five readings of the DOL X-ray with an "additional statement." That is hardly a limitation on quantity. Such a misinterpretation would focus, as the old regulations did, on the quantity of readings and the credibility of the readers versus evidence addressing the actual physical condition of the miner. If permitted, will the parties then be allowed to submit two rereadings of the DOL X-ray as its two "affirmative" readings? That would yield seven readings and two "additional statements." As I previously noted, the drafters intended that each party may submit "one piece of evidence 'challenging'…the Department's [X-ray]." 64 Fed. Reg. 54993 (Oct. 8, 1999). The argument that the regulation does not expressly preclude rereadings of the DOL X-ray as "affirmative" evidence is not persuasive, because the evidentiary scheme is plainly set forth.

Rather than participate in an unwarranted expansion of the precise words of the regulation, ignore the expressed intent of the drafters, and return to the unwieldy, former regime of allowing nearly unlimited X-ray evidence, I will follow the regulation and not admit EX 5, Dr. Scott's rereading of the 9/30/04 DOL X-ray, in evidence as one of the Employer's two "affirmative" readings.

B. Pulmonary Function Studies[16]

Pulmonary Function Studies ("PFS") are tests performed to measure the degree of impairment of pulmonary function. They range from simple tests of ventilation to very sophisticated examinations requiring complicated equipment. The most frequently performed tests measure forced vital capacity (FVC), forced expiratory volume in one-second (FEV_1) and maximum voluntary ventilation (MVV).

Physician Date Exh.#	**Age Height**	**FEV_1**	**MVV**	**FVC**	**Trac-ings**	**Compre-hension Cooper-ation**	**Qualify * Con-form****	**Dr.'s Impression**
Gaziano 9/30/04 DX 11	61 70"	2.29 2.65	59	3.52 3.74	Yes	Good Good	No* Yes** No* Yes**	Gaziano states it is mildly ab-normal & part-ially reversible

*A "**qualifying**" pulmonary study or arterial blood gas study yields values which are equal to or less than the applicable table values set forth in Appendices B and C of Part 718.

** A study "**conforms**" if it complies with applicable standards (found in 20 C.F.R. § 718.103(b) and (c)). (*See Old Ben Coal Co. v. Battram*, 7 F.3d 1273, 1276 (7th Cir. 1993)). A judge may infer in the absence of evidence to the contrary, that the results reported represent the best of three trials. *Braden v. Director, OWCP,* 6 B.L.R. 1-1083 (1984). A study which is not accompanied by three tracings may be discredited. *Estes v. Director, OWCP*, 7 B.L.R. 1-414 (1984).

Appendix B (Effective Jan. 19, 2001) states "(2) the administration of pulmonary function tests shall conform to the following criteria: (i) Tests shall not be performed during or soon after an acute respiratory illness…"

Appendix B (Effective Jan. 19, 2001), (2)(ii)(G): Effort is deemed "unacceptable" when the subject "[H]as an excessive variability between the three acceptable curves. The variation between the two largest FEV_1'S of the three acceptable tracings should not exceed 5 percent of the largest FEV_1 or 100 ml, whichever is greater. As individuals with obstructive disease or rapid decline in lung function will be less likely to achieve the degree of reproducibility, tests not meeting this criterion may still be submitted for consideration in support of a claim for black lung benefits. Failure to meet this standard should be clearly noted in the test report by the physician conducting or reviewing the test." (Emphasis added).

For a miner of the claimant's height of 70 inches, § 718.204(b)(2)(i) requires an FEV_1 equal to or less than 2.04 for a male 61 years of age.[17] If such an FEV_1 is shown, there must be in addition, an FVC equal to or less than 2.61 or an MVV equal to or less than 82; or a ratio equal

[16] § 718.103(a)(Effective for tests conducted after Jan. 19, 2001 (See 718.101(b)), provides: "Any report of pulmonary function tests submitted in connection with a claim for benefits shall record the results of flow versus volume (flow-volume loop)." 65 Fed. Reg. 80047 (Dec. 20, 2000). In the case of a deceased miner, where no pulmonary function test are in substantial compliance with paragraphs (a) and (b) and Appendix B, noncomplying tests may form the basis for a finding if, in the opinion of the adjudication officer, the tests demonstrate technically valid results obtained with good cooperation of the miner. 20 C.F.R. § 718.103(c).

[17] The fact-finder must resolve conflicting heights of the miner on the ventilatory study reports in the claim. *Protopappas v. Director, OWCP*, 6 B.L.R. 1-221 (1983). This is particularly true when the discrepancies may affect whether or not the tests are "qualifying." *Toler v. Eastern Associated Coal Co.*, 42 F.3d 3 (4th cir. 1995). I find the miner is 70" here.

to or less than 55% when the results of the FEV_1 tests are divided by the results of the FVC test. Qualifying values for other ages and heights are as depicted in the table below. The FEV_1/FVC ratio requirement remains constant.

C. Arterial Blood Gas Studies[18]

Blood gas studies are performed to detect an impairment in the process of alveolar gas exchange. This defect will manifest itself primarily as a fall in arterial oxygen tension either at rest or during exercise. A lower level of oxygen (O_2) compared to carbon dioxide (CO_2) in the blood, expressed in percentages, indicates a deficiency in the transfer of gases through the alveoli which will leave the miner disabled.

Date **Ex. #**	**Physician**	**PCO_2**	**PO_2**	**Qualify**	**Physician Impression**
9/30/04 DX 11	Gaziano	27	67	Yes	Gaziano finds moderate impairment.(CX 2, 3). Dr. Ranavaya finds acceptable.

*Results, if any, after exercise. Exercise studies are not required if medically contraindicated. 20 C.F.R. § 718.105(b).

Appendix C to Part 718 (Effective Jan. 19, 2001) states: "Tests shall not be performed during or soon after an acute respiratory or cardiac illness."

D. Physicians' Reports[19]

A determination of the existence of pneumoconiosis may be made if a physician, exercising sound medical judgment, notwithstanding a negative X-ray, finds that the miner suffers or suffered from pneumoconiosis. 20 C.F.R. § 718.202(a)(4). Where total disability cannot be established, under 20 C.F.R. § 718.204(b)(2)(i) through (iii), or where pulmonary function tests and/or blood gas studies are medically contraindicated, total disability may be nevertheless found, if a physician, exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevents or prevented the miner from engaging in employment, i.e., performing his usual coal mine work or comparable and gainful work. § 718.204(b).

Dr. Dominic Gaziano is a B-reader and is Board-certified in internal medicine with a subspecialty in chest diseases. (DX 11; CX 2, 3). He is a clinical professor of medicine and Chairman, Section Pulmonary Disease, CAMC. His report, based upon his examination of the

[18] 20 C.F.R. § 718.105 sets the quality standards for blood gas studies.
20 C.F.R. §718.204(b)(2) permits the use of such studies to establish "total disability." It provides: In the absence of contrary probative evidence which meets the standards of either paragraphs (b)(2)(i), (ii), (iii), or (iv) of this section shall establish a miner's total disability:…
(2)(ii) Arterial blood gas tests show the values listed in Appendix C to this part…

[19] *Dempsey v. Sewell Coal Co. & Director, OWCP* 23 B.L.R. 1-47, BRB Nos. 03-0615 BLA and 03-0615 BLA-A (June 28, 2004) (*en banc*). Under (new) 2001 regulations, expert opinions must be based on admissible evidence.

miner, on September 30, 2004, notes 13 years of coal mine employment and a 27-year, 1 ½ pack per day smoking history ending in 2000. (DX 11). He wrote the miner reported no history of asthma.

Based on an EKG, qualifying arterial blood gases, a pulmonary function study showing mild reversible obstruction, and a positive ("1/0") chest X-ray, Dr. Gaziano diagnosed coal workers' pneumoconiosis and asthmatic bronchitis. The former was due to coal mine dust exposure. (DX 11).

He opined that the claimant's pulmonary impairment was "moderately" contributed to by his coal dust exposure induced CWP. Dr. Gaziano diagnosed a severe impairment with moderate contribution by CWP. (DX 11).

Dr. Gaziano reviewed the reports of Drs. Hippensteel and Crisalli. He disagrees with any assessment that would attribute the miner's respiratory impairment with obesity, finding the miner was not morbidly obese, a predicate required for such diagnoses. The miner was "moderately" obese and according to medical literature (attached to his review) the miner would not be expected to cause the respiratory affliction suffered by the miner. Neither physician opinion would cause him to change his earlier assessment.

Dr. Kirk E. Hippensteel, is a B-reader B-reader and is Board-certified in internal medicine with a subspecialties in pulmonary diseases and critical care medicine. He is an associate professor of medicine in the clinical department of the University of Virginia. His consultation report, based upon his review of the enumerated medical records of the claimant, on June 16, 2005, notes 14 years of coal mine employment and a 30-year, 1 ½ pack per day smoking history.[20] (EX 2). Finding the miner 70" tall and weighing 297 pounds, Dr. Hippensteel wrote that Dr. Gaziano failed to properly account for the miner's morbid obesity's impact on gas exchange. He opined that the miner's ventilatory function was only mildly abnormal and significantly reversible which also is not compatible with a fixed and irreversible disease expected from coal workers' pneumoconiosis. Even if found to have CWP, Dr. Hippensteel believes the miner's impairment would be unrelated to coal mine dust exposure. (EX 2).

Dr. Hippensteel testified at a deposition on June 8, 2006. (EX 6). He reiterated his credentials, findings and elucidated the findings set forth in his earlier report. He testified that the PFS post-bronchodilator "reversibility" results were consistent with asthma. (EX 6 at 11). Based on the AGS , he opined the miner's hypoxemia was related to asthma and his obesity. Dr. Hippensteel testified that the classification of what is morbidly obese now differs from the well-recognized Bates' article relied upon by Dr. Gaziano. He explained the gradual worsening of function as the body mass index increases, including impaired ventilation. (EX 6 at 15). Dr. Hippensteel's more current research revealed that there is a progressive deterioration in pulmonary function the more obese one gets. The miner's BMI was nearly 43, over the 40 BMI which defines morbid obesity. The Santana Study, relied upon by Dr. Gaziano, lacked credibility because the studied cohort was too small. Dr. Hippensteel testified that although the miner's AGS was "qualifying", he "certainly had the respiratory capacity to return to his previous job in the mines." (EX 6 at 20). He concluded the miner had neither clinical nor "legal"

[20] He testified of a 45-year smoking history, ending in 2000, at his deposition. (EX 6 at 10).

pneumoconiosis. While the miner was disabled as a "whole man," he was not due to occupational exposure.

Dr. Robert J. Crisalli, is a B-reader and is Board-certified in internal medicine with a subspecialty in pulmonary diseases. He is a clinical associate professor and Chief, Pulmonary Department of Medicine, CAMC. His consultation report, based upon his review of enumerated medical records of the claimant, on April 5, 2006, notes 11.5 years of coal mine employment and a 25-year, pack and one-half per day, smoking history. (EX 4). Dr. Crisalli found the evidence he reviewed insufficient to diagnose CWP. He noted the miner's "other" exposures. He observed the PFS showed a "mild airway obstruction. . . with significant improvement after bronchodilators. . . [with] wheezing . . . consistent with a diagnosis of asthma." Finding the miner hypoxemic at rest, Dr. Crisalli considered it was related to his obesity. He concluded the miner had no pulmonary disease that would prevent him from performing his usual coal mine work. (EX 4).

Dr. Crisalli testified at a deposition on June 19, 2006. (EX 7). He reiterated his credentials, findings and elucidated the findings set forth in his earlier report. He opined that some of the X-ray readings may have been inaccurate, i.e., markings and the location of opacities, due to the miner's size. (EX 7 at 13-15). He concluded most of the X-ray reports show no evidence of CWP. He explained how severe obesity can affect one's breathing, as here, i.e., causing a restrictive defect and hypoxemia. (EX 7 at 16-17). The AGS do not demonstrate a totally disabling impairment for a 61-year old and are a result of "extrinsic" factors, i.e., his obesity. (EX 7 at 24, 36). The reversibility on PFS is not typical of CWP. Dr. Crisalli concluded that the miner's very mild degree of obstruction would not have prevented him from returning to his previous coal mine employment. (EX 7 at 20). He attributed the airflow obstruction to the miner's very heavy smoking history. (EX 7 at 23).

III. Hospital Records & Physician Office Notes

Five pages of records from the Charleston Area Medical Center show Dr. Mantz's assessments involving" abdominal aortic aneurysm; hypertension; hyperlipidemia; class II obesity; former tobacco abuse; history of pneumonia and pneumothorax; chronic dyspnea; diabetes; nocturia; nophrolithiasis; osteoarthritis; chronic back pain; and left knee repair. (EX 1). In the medical history the miner denied any history of asthma, TB, or chronic cough.

IV. Other

Drs. Capiello and Wiot both read a digital X-ray, dated 8/7/03, which must be considered under the "other" evidence standards rather than as X-ray evidence. (CX 4; EX 3). Both are dual-qualified readers. Dr. Capiello observed fibrotic changes suggesting pneumoconiosis with no evidence of infiltrate, pleural plaque, pleural thickening, or large opacities. He found scattered small predominantly rounded parenchymal opacities, up to 1.5 mm, throughout six lung zones. His impression was "pneumoconiosis category p/p." Dr. Wiot found no evidence of CWP.

In July 2004, the miner wrote that he left the mines because the mine shut down. He wrote he experienced shortness of breath, difficulty walking, and phlegm in the mornings. (DX

2). The miner died on January 18, 2005 at age 61. (CX 5). The cause of death was listed, by Dr. Bhirud, as atherosclerotic heart disease with no other contributing conditions listed. No autopsy was preformed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Entitlement to Benefits

This claim must be adjudicated under the Regulations at 20 C.F.R. Part 718 because it was filed after March 31, 1980. Under this Part, the claimant must establish, by a preponderance of the evidence, that: (1) he has pneumoconiosis; (2) his pneumoconiosis arose out of coal mine employment; and, (3) he is totally disabled due to pneumoconiosis. Failure to establish any one of these elements precludes entitlement to benefits. 20 C.F.R. §§ 718.202-718.205; *Anderson v. Valley Camp of Utah, Inc.*, 12 B.L.R. 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 B.L.R. 1-26 (1987); and, *Perry v. Director, OWCP*, 9 B.L.R. 1-1 (1986); *Lane v. Union Carbide Corp.*, 105 F.3d 166, 170 (4th Cir. 1997). The claimant bears the burden of proving each element of the claim by a preponderance of the evidence, except insofar as a presumption may apply. *See Director, OWCP v. Mangifest*, 826 F.2d 1318, 1320 (3d Cir. 1987). Failure to establish any of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 B.L.R. 1-1 (1986). Moreover, "[T]he presence of evidence favorable to the claimant or even a tie in the proof will not suffice to meet that burden." *Eastover Mining Co. v. Director, OWCP [Williams]*,338 F.3d 501, No. 01-4064 (6th Cir. July 31, 2003), *citing Greenwhich Collieries [Ondecko]*, 512 U.S. 267 at 281; *see also Peabody Coal Co. v. Odom*, ___ F.3d ___, 2003 WL 21998333 (6th Cir. Aug. 25, 2003)(Credit treating physician on more than mere status).

B. Existence of Pneumoconiosis

Pneumoconiosis is defined as a "chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment."[21] 30 U.S.C. § 902(b) and 20 C.F.R. § 718.201. The definition is not confined to "coal workers' pneumoconiosis," but also includes other diseases arising out of coal mine employment, such as

[21] Pneumoconiosis is a progressive and irreversible disease; once present, it does not go away. *Mullins Coal Co. v. Director, OWCP,* 484 U.S. 135, 151 (1987); *Lisa Lee Mines v. Director*, 86 F.3d 1358 (4th Cir. 1996)(*en banc*) at 1362; *LaBelle Processing Co. v. Swarrow*, 72 F.3d 308 (3rd Cir. 1995) at 314-315. In *Henley v. Cowan and Co*., 21 B.L.R. 1-148 (May 11, 1999), the Board holds that aggravation of a pulmonary condition by dust exposure in coal mine employment must be "significant and permanent" in order to qualify as CWP, under the Act. In *Workman v. Eastern Associated Coal Corp.,* 23 B.L.R. 1-22, BRB No. 02-0727 BLA (Aug. 19, 2004)(order on recon)(*En banc*) the Board ruled that because the potential for progressivity and latency is inherent in every case, a miner who proves the presence of pneumoconiosis that was not manifest at the cessation of his coal mine employment, or who proves that his pneumoconiosis is currently disabling when it was previously not, has demonstrated that the disease from which he suffers is of a progressive nature. In amending section 718.201, DOL concluded chronic dust diseases of the lung and its sequelae arising out of coal mine employment "may be latent and progressive, albeit in a minority of cases." *See* 64 Fed. Reg. 54978-79 (Oct. 8, 1999); 65 Fed. Reg. 79937-44, 79968-72 (Dec. 20, 2000); 68 Fed. Reg. 69930-31 (Dec. 15, 2003). "Although every case of pneumoconiosis does not possess these characteristics, the regulation was designed to prevent operators from asserting that pneumoconiosis is never latent and progressive. 20 C.F.R. Section 718.201(c); *see National Mining Association, et al, v. Chao, Sec. of Labor,* 160 F. Supp. 2d 47 (D.D.C. Aug. 9, 2001) *aff'd*, 292 F.3d 849 (D.C. Cir. 2002)(*"NMA")*, 292 F.3d at 863."
Midland Coal Co. v. Director, OWCP[Shores], 358 F.3d 486 (7th Cir. 2004). Seventh Circuit upheld DOL's 2001 definition of CWP as a latent and progressive disease. DOL's regulation, on this scientific finding is entitled to deference. It is designed to prevent operators from claiming CWP is never latent and progressive.

anthracosilisosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, progressive massive fibrosis, silicosis, or silicotuberculosis. 20 C.F.R. § 718.201.[22]

The term "arising out of coal mine employment" is defined as including "any chronic pulmonary disease resulting in respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment."[23] Thus, "pneumoconiosis," as defined by the Act, has a much broader legal meaning than does the medical definition. *See infra* note 42.

"…[T]his broad definition 'effectively allows for the compensation of miners suffering from a variety of respiratory problems that may bear a relationship to their employment in the coal mines.'" *Robinson v. Pickands Mather & Co./Leslie Coal Co. & Director, OWCP*, 14 B.L.R. 2-68 (4th Cir. 1990) at 2-78, 914 F.2d 35 (4th Cir. 1990) *citing, Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 938 (4th Cir. 1980).

Thus, asthma, asthmatic bronchitis, or emphysema may fall under the regulatory definition of pneumoconiosis if they are related to coal dust exposure. *Robinson v. Director, OWCP*, 3 B.L.R. 1-798.7 (1981); *Tokarcik v. Consolidation Coal Co.*, 6 B.L.R. 1-666 (1983). Likewise, chronic obstructive pulmonary disease may be encompassed within the legal definition of pneumoconiosis. *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173 (4th Cir. 1995) and *see* § 718.201(a)(2)(2001).

The claimant has the burden of proving the existence of pneumoconiosis. The Regulations provide the means of establishing the existence of pneumoconiosis by: (1) a chest X-ray meeting the criteria set forth in 20 C.F.R. § 718.202(a)(1); (2) a biopsy or autopsy conducted and reported in compliance with 20 C.F.R. § 718.106; (3) application of the irrebuttable presumption for "complicated pneumoconiosis" found in 20 C.F.R. § 718.304; or (4) a

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[22] Regulatory amendments, effective January 19, 2001, state:

(a) For the purpose of the Act, "pneumoconiosis" means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. This definition includes both medical, or "clinical", pneumoconiosis and statutory, or "legal", pneumoconiosis.

(1) Clinical Pneumoconiosis. "Clinical pneumoconiosis" consists of those diseases recognized by the medical community as pneumoconiosis, i.e., the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.

(2) Legal Pneumoconiosis. "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.

(b) For purposes of this section, a disease "arising out of coal mine employment" includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment.

(c) For purposes of this definition, "pneumoconiosis" is recognized as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure.

(Emphasis added).

[23] The definition of pneumoconiosis, in 20 C.F.R. section 718.201, does not contain a requirement that "coal dust specific diseases …attain the status of an "impairment" to be so classified. The definition is satisfied "whenever one of these diseases is present in the miner at a detectable level; whether or not the particular disease exists to such an extent as to become compensable is a separate question." Moreover, the legal definition of pneumoconiosis "encompasses a wide variety of conditions; among those are diseases whose etiology is not the inhalation of coal dust, but whose respiratory and pulmonary symptomatology have nevertheless been made worse by coal dust exposure. *See, e.g., Warth*, 60 F.3d at 175." *Clinchfield Coal v. Fuller*, 180 F.3d 622 (4th Cir. June 25, 1999) at 625.

determination of the existence of pneumoconiosis made by a physician exercising sound judgment, based upon certain clinical data and medical and work histories, and supported by a reasoned medical opinion.[24] 20 C.F.R. § 718.202(a)(4).

In *Island Creek Coal Co. v. Compton*, 211 F.3d 203 (4th Cir. 2000), the Fourth Circuit held that the administrative law judge must weigh all evidence together under 20 C.F.R. § 718.202(a) to determine whether the miner suffered from coal workers' pneumoconiosis. This is contrary to the Board's view that an administrative law judge may weigh the evidence under each subsection separately, i.e. X-ray evidence at § 718.202(a)(1) is weighed apart from the medical opinion evidence at § 718.202(a)(4). In so holding, the court cited to the Third Circuit's decision in *Penn Allegheny Coal Co. v. Williams,* 114 F.3d 22, 24-25 (3d Cir. 1997) which requires the same analysis.

The claimant cannot establish pneumoconiosis pursuant to subsection 718.202(a)(2) because there is no biopsy evidence in the record. The claimant cannot establish pneumoconiosis under § 718.202(a)(3), as none of that sections presumptions are applicable to a living miner's claim field after January 1, 1982, with no evidence of complicated pneumoconiosis.

A finding of the existence of pneumoconiosis may be made with positive chest X-ray evidence.[25] 20 C.F.R. § 718.202(a)(1). The correlation between "physiologic and radiographic abnormalities is poor" in cases involving CWP. "[W]here two or more X-ray reports are in conflict, in evaluating such X-ray reports, consideration shall be given to the radiological qualifications of the physicians interpreting such X-rays." *Id.; Dixon v. North Camp Coal Co*., 8 B.L.R. 1-344 (1985)." (Fact one is Board-certified in internal medicine or highly published is not so equated). *Melnick v. Consolidation Coal Co. & Director, OWCP*, 16 B.L.R. 1-31, 1-37 (1991). Readers who are Board-certified radiologists and/or B-readers are classified as the most qualified. The qualifications of a certified radiologist are at least comparable to if not superior to a physician certified as a B-reader. *Roberts v. Bethlehem Mines Corp.*, 8 B.L.R. 1-211, 1-213 n.5 (1985).

A judge is not required to defer to the numerical superiority of X-ray evidence, although it is within his or her discretion to do so. *Wilt v. Wolverine Mining Co.*, 14 B.L.R. 1-70 (1990) citing *Edmiston v. F & R Coal*, 14 B.L.R. 1-65 (1990). This is particularly so where the majority of negative readings are by the most qualified physicians. *Dixon v. North Camp Coal Co.*, 8 B.L.R. 1-344 (1985); *Melnick v. Consolidation Coal Co. & Director, OWCP,* 16 B.L.R. 1-31, 1-37 (1991).

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[24] In accordance with the Board's guidance, I find each medical opinion documented and reasoned, unless otherwise noted. *Collins v. J & L Steel,* 21 B.L.R. 1-182 (1999) *citing Trumbo v. Reading Anthracite Co.*, 17 B.L.R. 1-85 (1993); *Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19 (1987); and, *Sterling Smokeless Coal Co. v. Akers*, 121 F.3d 438, 21 B.L.R. 2-269 (4th Cir. 1997). This is the case, because except as otherwise noted, they are "documented" (medical), i.e., the reports set forth the clinical findings, observations, facts, etc., on which the doctor has based his diagnosis and "reasoned" since the documentation supports the doctor's assessment of the miner's health.

[25] "There are twelve levels of profusion classifications for the radiographic interpretation of simple pneumoconiosis…*See* N. LeRoy Lapp, '*A Lawyer's Medical Guide to Black Lung Litigation*,' 83 W.Va. Law Rev. 721, 729-731 (1981)." Cited in *Lisa Lee Mines v. Director*, 86 F.3d 1358 (4th cir. 1996)(*en banc*) at 1359, n.1.

While both Drs. Miller and Wheeler are dually-qualified readers, the latter is somewhat better qualified. Although Dr. Gaziano read the 9/30/04 X-ray positive, he is only a B-reader. Absent other evidence, I would find the X-ray evidence alone in equipoise. Considering the 8/7/03 readings, including one during hospitalization, and the two digital readings, I find the evidence insufficient to establish CWP when considered with the "other" evidence. Radiologist Dr. Reifsteck made no mention of any pneumoconiosis. Highly-qualified Dr. Wiot also found the X-ray negative. While Dr. Capiello found fibrosis compatible with CWP, he is somewhat less qualified than Dr. Wiot.

A determination of the existence of pneumoconiosis can be made if a physician, exercising sound medical judgment, based upon certain clinical data, medical and work histories and supported by a reasoned medical opinion, finds the miner suffers or suffered from pneumoconiosis, as defined in § 718.201, notwithstanding a negative X-ray.[26] 20 C.F.R. § 718.202(a).

Medical reports which are based upon and supported by patient histories, a review of symptoms, and a physical examination constitute adequately documented medical opinions as contemplated by the Regulations. *Justice v. Director, OWCP*, 6 B.L.R. 1-1127 (1984). However, where the physician's report, although documented, fails to explain how the documentation supports its conclusions, an Administrative Law Judge may find the report is not a reasoned medical opinion. *Smith v. Eastern Coal Co.*, 6 B.L.R. 1-1130 (1984). A medical opinion shall not be considered sufficiently reasoned if the underlying objective medical data contradicts it.[27] *White v. Director, OWCP*, 6 B.L.R. 1-368 (1983).

Physician's qualifications are relevant in assessing the respective probative value to which their opinions are entitled. *Burns v. Director, OWCP*, 7 B.L.R. 1-597 (1984). Because of their various Board-certifications, B-reader status, and expertise, as noted above, I rank Drs. Gaziano, Hippensteel, and Crisalli more or less equally.

As a general rule, more weight is given to the most recent evidence because pneumoconiosis is a progressive and irreversible disease. *Stanford v. Director, OWCP*, 7 B.L.R. 1-541 (1984); *Tokarcik v. Consolidated Coal Co.*, 6 B.L.R. 1-166 (1983); and, *Call v. Director, OWCP*, 2 B.L.R. 1-146 (1979).[28] This rule is not to be mechanically applied to require that later

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[26] *Soubik v. Director, OWCP*, 366 F.3d 226, Case No. 03-1668, 23 B.L.R. 2-85 (3rd Cir. April 30, 2004). Physician's failure to diagnose the presence of pneumoconiosis would have an adverse effect on his or her ability to assess whether a miner's death was due to the disease. (Here, Dr. Spagnolo wrote that even if the miner had CWP, it would not have hastened his death despite both parties having agreed to the existence of the disease). Cites *Scott v. Mason Coal Co.,* 289 F.3d 263, 22 B.L.R. 2-374 (4th Cir. May 2, 2002) for proposition ALJ may not credit a diagnosis of no CWP causing respiratory disability after ALJ has found CWP, unless "specific and persuasive reasons" are given.

[27] *Fields v. Director, OWCP*, 10 B.L.R. 1-19, 1-22 (1987). "A 'documented' (medical) report sets forth the clinical findings, observations, facts, etc., on which the doctor has based his diagnosis. A report is 'reasoned' if the documentation supports the doctor's assessment of the miner's health. *Fuller v. Gibraltor Coal Corp.*, 6 B.L.R. 1-1291 (1984)…" In *Cornett v. Benham Coal, Inc.,* 227 F.3d 569, Case No. 99-3469, 22 B.L.R. 2-107 (6th Cir. Sept. 7, 2000), the court held if a physician bases a finding of CWP only upon the miner's history of coal dust exposure and a positive X-ray, then the opinion should not count as a reasoned medical opinion, under 20 C.F.R. § 718.202(a)(4).

[28] *Cranor v. Peabody Coal Co.*, 21 B.L.R. 1-201, BRB No. 97-1668 (Oct. 29, 1999) *on recon*. 22 B.L.R. 1-1 (Oct. 29, 1999)(*En Banc.*). In a case arising in the Sixth Circuit, the Board held it was proper for the judge to give greater weight to more recent evidence, as the Circuit has found CWP to be a "progressive and degenerative disease." *See also Abshire v. D & L Coal Co*. 22 B.L.R. 1-203 (2002), citing *Staton v. Norfolk & Western Railroad Co.*, 65 F.3d 55, 19 B.L.R. 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP,* 991 F.2d 314, 17 B.L.R. 2-77 (6th Cir. 1993); *Edmiston v. F & R Coal Co.*, 14 B.L.R. 1-65 (1990); and,

evidence be accepted over earlier evidence. *Burns v. Director, OWCP*, 7 B.L.R. 1-597 (1984); *Adkins v. Director, OWCP*, 958 F.2d 49, 16 B.L.R. 2-61 (4th Cir. 1992). It is rational to credit more recent evidence, solely on the basis of recency, only if it shows the miner's condition has progressed or worsened. The court reasoned that, because it is impossible to reconcile conflicting evidence based on its chronological order if the evidence shows that a miner's condition has improved, inasmuch as pneumoconiosis is a progressive disease and claimants cannot get better, "[e]ither the earlier or later result must be wrong, and it is just as likely that the later evidence is faulty as the earlier…" *See also, Thorn v. Itmann Coal Co.,* 3 F.3d 713, 18 B.L.R. 2-16 (4th Cir. 1993).]

It is proper for an administrative law judge to accord greater weight to a physician who "integrated all of the objective evidence" more than contrary physicians of record, particularly where he considered tests results showing diffusion impairment, reversibility studies, and blood gas readings. *Midland Coal Co. v. Director, OWCP[Shores]*, 358 F.3d 486 (7th Cir. 2004).

All the doctors agreed that the test results show the miner suffered from some form of asthma. Dr. Gaziano diagnosed pneumoconiosis arising from coal dust exposure. Drs. Hippensteel and Crisalli did not. Dr. Crisalli is the only physician to discuss the impact of the miner's lengthy smoking history, attributing his airflow obstruction to it. Likewise, he was the only physician to even note the miner's "other" exposures. Neither Dr. Gaziano nor Dr. Hippensteel address these matters. However, both Drs. Hippensteel and Crisalli attribute the miner's respiratory affliction to his "morbid" obesity. These physicians convince me that Dr. Gazaino's reliance on the "Bates" study was misplaced and that the latter was thus incorrect in assessing the degree of the miner's obesity. Moreover, Dr. Crisalli testified how the miner's obesity could have made X-ray readings inaccurate. Of the three analyses, I consider Dr. Crisalli's to be the most comprehensive and well-reasoned. I thus find the miner's mild obstructive disease and hypoxemia were more likely than not due to asthma and obesity. Moreover, neither the Death Certificate (prepared without the benefit of an autopsy) nor the hospital records support a finding of clinical or legal CWP.

I find the claimant has not met his burden of proof in establishing the existence of pneumoconiosis. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 114 S.Ct. 2251, 129 L.Ed.2d 221 (1994) *aff'g sub. nom. Greenwich Collieries v. Director, OWCP,* 990 F.2d 730, 17 B.L.R. 2-64 (3d Cir. 1993).

C. Cause of Pneumoconiosis

Once the miner is found to have pneumoconiosis, he must show that it arose, at least in part, out of coal mine employment.[29] 20 C.F.R. § 718.203(a)(2001). If a miner who is suffering from pneumoconiosis was employed for ten years or more in the coal mines, there is a rebuttable presumption that the pneumoconiosis arose out of such employment. 20 C.F.R § 718.203(b)(2001). If a miner who is suffering or suffered from pneumoconiosis was employed

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Clark v. Karst-Robbin Coal Co., 12 B.L.R. 10-149 (1989), the Board holds greater weight may be accorded to more recent X-ray evidence of record. In *Abshire*, the Board also recognized *Mullins Coal Co. of Virginia v. Director, OWCP*, 484 U.S. 135, 11 B.L.R. 2-1 (1987) (CWP is a progressive disease).

[29] *Hutchens v. Director, OWCP*, 8 B.L.R. 1-16 (1985). Judge must consider a miner's non-coal mine employment in determining whether his pneumoconiosis "arose out of" coal mine employment.

less than ten years in the nation's coal mines, it shall be determined that such pneumoconiosis arose out of coal mine employment only if competent evidence establishes such a relationship. 20 C.F.R. § 718.203(c)(2001).[30]

Since the miner had ten years or more of coal mine employment, the claimant would ordinarily receive the benefit of the rebuttable presumption that his pneumoconiosis arose out of coal mine employment. However, in view of my finding that the existence of CWP has not been proven the issue is moot. Moreover, the presumption is rebutted by the medical opinion evidence discussed herein.

D. Existence of total disability due to pneumoconiosis

The claimant must show his total pulmonary disability is caused by pneumoconiosis. 20 C.F.R. § 718.204(b).[31] Section 718.204(b)(2)(i) through (b)(2)(iv) and (d) set forth criteria to establish total disability: (i) pulmonary function studies with qualifying values; (ii) blood gas studies with qualifying values; (iii) evidence that miner has pneumoconiosis and suffers from cor pulmonale with right-side congestive heart failure; (iv) reasoned medical opinions concluding the miner's respiratory or pulmonary condition prevents him from engaging in his usual coal mine employment and gainful employment requiring comparable abilities and skills; and lay testimony.[32] Under this subsection, the Administrative Law Judge must consider all the evidence of record and determine whether the record contains "contrary probative evidence." If it does, the Administrative Law Judge must assign this evidence appropriate weight and determine "whether it outweighs the evidence supportive of a finding of total respiratory disability." *Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19, 1-21 (1987); *see also Shedlock v. Bethlehem Mines Corp.*, 9 B.L.R. 1-195, 1-198 (1986), *aff'd on reconsideration en banc*, 9 B.L.R. 1-236 (1987).

Section 718.204(b)(2)(iii) is not applicable because there is no evidence that the claimant suffers from cor pulmonale with right-sided congestive heart failure. Section 718.204(d) is not applicable because it only applies to a survivor's claim or deceased miners' claim in the absence of medical or other relevant evidence.

Section 718.204(b)(2)(i) provides that a pulmonary function test may establish total disability if its values are equal to or less than those listed in Appendix B of Part 718. The

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[30] Specifically, the burden of proof is met under § 718.203(c) when "competent evidence establish[es] that his pneumoconiosis is significantly related to or substantially aggravated by the dust exposure of his coal mine employment." *Shoup v. Director, OWCP,* 11 B.L.R. 1-110, 1-112 (1987).

[31] The Board has held it is the claimant's burden to establish total disability due to CWP by a preponderance of the evidence. *Baumgartner v. Director, OWCP*, 9 B.L.R. 1-65, 1-66 (1986); *Gee v. Moore & Sons*, 9 B.L.R. 1-4, 1-6 (1986)(en banc). 20 C.F.R. § 718.204 (Effective Jan. 19, 2001). Total disability and disability causation defined; criteria for determining total disability and total disability due to pneumoconiosis, states:

> (a) General. Benefits are provided under the Act for or on behalf of miners who are totally disabled due to pneumoconiosis, or who were totally disabled due to pneumoconiosis at the time of death. For purposes of this section, any nonpulmonary or nonrespiratory condition or disease, which causes an independent disability unrelated to the miner's pulmonary or respiratory disability, shall not be considered in determining whether a miner is totally disabled due to pneumoconiosis. If, however, a nonpulmonary or nonrespiratory condition or disease shall be considered in determining whether a miner is or was totally disabled due to pneumoconiosis.

[32] In a living miner's claim, lay testimony "is not sufficient, in and of itself, to establish disability." *Tedesco v. Director, OWCP*, 18 B.L.R. 1-103 (1994). See 20 C.F.R. § 718.204(d)(5)(living miner's statements or testimony insufficient alone to establish total disability). But, pre-death statements of a now deceased miner "shall be considered" in determining whether the miner was totally disabled at the time of death. 20 C.F.R. § 718.204(d)(4).

miner's only PFS results were "non-qualifying" and thus, alone do not establish total respiratory disability.

Claimants may also demonstrate total disability due to pneumoconiosis based on the results of arterial blood gas studies that evidence an impairment in the transfer of oxygen and carbon dioxide between the lung alveoli and the blood stream. § 718.204(b)(2)(ii). The miner's only AGS results were "qualifying" and thus, alone establish total respiratory disability.

Finally, total disability may be demonstrated, under § 718.204(b)(2)(iv), if a physician, exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevents or prevented the miner from engaging in employment, i.e., performing his usual coal mine work or comparable or gainful work. § 718.204(b). Under this subsection, "…all the evidence relevant to the question of total disability due to pneumoconiosis is to be weighed, with the claimant bearing the burden of establishing, by a preponderance of the evidence, the existence of this element." *Mazgaj v. Valley Coal Company*, 9 B.L.R. 1-201 (1986) at 1-204. The fact finder must compare the exertional requirements of the claimant's usual coal mine employment with a physician's assessment of the claimant's respiratory impairment. *Schetroma v. Director, OWCP,* 18 B.L.R. 1-19 (1993). Once it is demonstrated that the miner is unable to perform his usual coal mine work a *prima facie* finding of total disability is made and the burden of going forward with evidence to prove the claimant is able to perform gainful and comparable work falls upon the party opposing entitlement, as defined pursuant to 20 C.F.R. § 718.204(b)(2). *Taylor v. Evans & Gambrel Co.*, 12 B.L.R. 1-83 (1988).

I find that the miner's last coal mining positions required heavy manual labor. Because the claimant's symptoms rendered him unable to walk without shortness of breath, I find he was incapable of performing his prior coal mine employment.

The Fourth Circuit rule is that "nonrespiratory and nonpulmonary impairments have no bearing on establishing total disability due to pneumoconiosis." *Jewell Smokeless Coal Corp. v. Street,* 42 F.3d 241 (4th Cir. 1994). In *Milburn Colliery Co. v. Director, OWCP, [Hicks]*, 21 B.L.R. 2-323, 138 F.3d 524 (4th Cir. Mar. 6, 1998) *citing Jewell Smokeless Coal Corp. v. Street*, 42 F.3d 241, 243 (4th Cir. 1994), the Court had "rejected the argument that '[a] miner need only establish that he has a total disability, which may be due to pneumoconiosis in combination with nonrespiratory and nonpulmonary impairments." Even if it is determined that claimant suffers from a totally disabling respiratory condition, he "will not be eligible for benefits if he would have been totally disabled to the same degree because of his other health problems." *Id.* at 534. See *Midland Coal Co. v. Director, OWCP[Shores]*, 358 F.3d 486 (7th Cir. 2004)(Upholding validity of 20 C.F.R. section 718.204(a)(2001)("any nonpulmonary or nonrespiratory condition or disease, which causes independent disability unrelated to the miner's pulmonary or respiratory disability, shall not be considered in determining whether a miner is totally disabled due to pneumoconiosis."). However if, "a nonpulmonary or nonrespiratory condition or disease causes a chronic respiratory or pulmonary impairment, that condition or disease shall be considered in determining whether a miner is or was totally disabled due to pneumoconiosis." 20 C.F.R. § 718.204(a).

The Benefits Review Board had held that nonrespiratory and nonpulmonary impairments are irrelevant to establishing total disability, under 20 C.F.R. § 718.204. *Beatty v. Danri Corp.*, 16 B.L.R. 1-1 (1991).[33] *But see*, 20 C.F.R. § 718.204(a)(2001).

I find the claimant has met his burden of proof in establishing the existence of total disability.[34] *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 114 S.Ct. 2251, 129 L.Ed.2d 221 (1994), *aff'g sub. Nom. Greenwich Colleries v. Director, OWCP*, 990 F.2d 730, 17 B.L.R. 2-64 (3d Cir. 1993).

E. Cause of total disability[35]

The revised regulations, 20 C.F.R. § 718.204(c)(1),[36] require a claimant to establish his pneumoconiosis is a "substantially contributing cause" of his totally disabling respiratory or pulmonary disability.[37] The January 19, 2001 changes to 20 C.F.R. § 718.204(c)(1)(i) and (ii), adding the words "material" and "materially", results in "evidence that pneumoconiosis makes only a negligible, inconsequential, or insignificant contribution to the miner's total disability is insufficient to establish that pneumoconiosis is a substantially contributing cause of that disability." 65 Fed. Reg. No. 245, 799946 (Dec. 20, 2000).[38] If the pneumoconiosis "materially

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[33] The Board has held that its earlier statement, in *Carson*, that "The disabling loss of lung function due to extrinsic factors, e.g., loss of muscle function due to stroke, does not constitute respiratory or pulmonary disability pursuant to 20 C.F.R. § 718.204(c)," was incorrect and struck the language from its opinion. *Carson v. Westmoreland Coal Co.*, 20 B.L.R. 1-64 (1996), *mod'g on recon.*, 19 B.L.R. 1-16 (1994).

[34] *White v. New White Coal Co*., 23 B.L.R. 1-1, BRB No. 03-0367 BLA (Jan. 22, 2004) at 1-6. Judge is not required to consider claimant's age, education and work experience in determining whether the claimant suffers from a total respiratory disability. These issues are not relevant to it, pursuant to 20 C.F.R. section 718.204(b)(2)(iv).

[35] *Billings v. Harlan #4 Coal Co.*, ___ B.L.R. __, BRB No. 94-3721 (June 19, 1997). The Board has held that the issues of total disability and causation are independent; therefore, administrative law judges need not reject a Doctor's opinion on causation simply because the doctor did not consider the claimant's respiratory impairment to be totally disabling.

[36] *Gross v. Dominion Coal Corp.,* 23 B.L.R. 1-8, BRB No. 03-0118 (2003). "'The substantially contributing cause' standard of revised Section 718.204(c) was not intended to alter the meaning of 'total disability due to pneumoconiosis' as previously determined in decisions by the various United States Courts of Appeal under Part 718, but rather was intended to codify the courts' decisions. 65 Fed. Reg. at 79946-47. Under the existing law of the Fourth Circuit, claimant is not required to establish relative degrees of causal contribution by pneumoconiosis and smoking to demonstrate that his total disability is due to pneumoconiosis. See *Robinson v. Pickands Mather & Co./Leslie Coal Co. & Director, OWCP*, 14 B.L.R. 2-68 at 2-76, 914 F.2d 35 (CA4 1990)(holding that a claimant must prove that pneumoconiosis is at least a contributing cause of total disability). Pneumoconiosis must be a necessary condition of the claimant's disability in that it cannot play a merely de minimis role. *Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 1196 n.8, 19 B.L.R. 2-304, 2-320 n.8 (4th Cir. 1995)." (Fn 10, at 1-18) "Consequently, the revised regulation requires that the adverse effect of pneumoconiosis be 'material.'"

[37] This standard is more consistent with the Third Circuit's pre-amendment "substantial contributor" standard set forth in *Bonessa v. U.S. Steel Corp*., 884 F.2d 726, 13 B.L.R. 2-23 (3d Cir. 1989) than the Fourth Circuit's "contributing cause" standard set forth in *Robinson v. Picklands Mather & Co./ Leslie Coal Co. v. Director, OWCP*, 14 B.L.R. 2-68 at 2-76, 914 F.2d 35, 38 (4th Cir. 1990). In *Gross v. Dominion Coal Corp.,* 23 B.L.R. 1-8, BRB No. 03-0118 (2003), the Board observed that "[U]nder the existing law of the Fourth Circuit, claimant is not required to establish relative degrees of causal contribution by pneumoconiosis and smoking to demonstrate that his total disability is due to pneumoconiosis. See *Robinson v. Pickands Mather & Co./Leslie Coal Co. & Director, OWCP*, 14 B.L.R. 2-68 at 2-76, 914 F.2d 35 (CA4 1990)(holding that a claimant must prove that pneumoconiosis is at least a contributing cause of total disability). Pneumoconiosis must be a necessary condition of the claimant's disability in that it cannot play a merely *de minimis* role. *Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 1196 n.8, 19 B.L.R. 2-304, 2-320 n.8 (4th Cir. 1995)."

[38] Effective January 19, 2001, § 718.204(a) states, in pertinent part:

> For purposes of this section, any nonpulmonary or nonrespiratory condition or disease, which causes an independent disability unrelated to the miner's pulmonary or respiratory disability, shall not be considered in determining whether a miner is totally disabled due to pneumoconiosis. If, however, a nonpulmonary or nonrespiratory condition or disease causes a chronic respiratory or pulmonary impairment, that condition or disease shall be considered in determining whether the miner is or was totally disabled due to pneumoconiosis.

worsens" a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment, it is considered a "substantially contributing cause" of the disability. 20 C.F.R. § 718.204(c)(1)(ii)(2001).

The Fourth Circuit Court of Appeals had required that pneumoconiosis be a "contributing cause" of the claimant's total disability.[39] *Toler v. Eastern Associated Coal Co.*, 43 F.3d 109, 112 (4th Cir. 1995); *Jewel Smokeless Coal Corp. v. Street*, 42 F.3d 241, 243 (4th Cir. 1994). *But see*, 20 C.F.R. § 718.204(c)(1)(2001).

In *Street*, the Court emphasized the steps by which the cause of total disability may be determined by directing "the Administrative Law Judge [to] determine whether [the claimant] suffers from a respiratory or pulmonary impairment that is totally disabling and whether [the claimant's] pneumoconiosis contributes to this disability." *Street*, 42 F.3d 241 at 245.

"A claimant must be totally disabled due to pneumoconiosis and any other respiratory or pulmonary disease, not due to other non-respiratory or non-pulmonary ailments, in order to qualify for benefits." *Beatty v. Danri Corp. & Triangle Enterprises*, 16 B.L.R. 1-11 (1991) *aff'd* 49 F.3d 993 (3d Cir. 1995) *accord Jewell Smokeless Coal Corp.* (So, under *Beatty*, one whose disability is only 10% attributable to pneumoconiosis would be unable to recover benefits if his completely unrelated physical problems (i.e., stroke) created 90% of his total disability). *But see*, 20 C.F.R. § 718.204(c)(1)(2001).

The fact that a physician does not explain how he or she could distinguish between disability due to coal mining and cigarette smoking or refer to evidence which supports a total disability opinion, may make the opinion "unreasoned." *Gilliam v. G&O Coal Co.*, 7 B.L.R. 1-59 (1984).[40] The fact that Drs. Gaziano and Hippensteel did not account for the impact of the miner's smoking has persuaded me to give their opinions lesser weight than Dr. Crisalli's opinion.

There is evidence of record that claimant's respiratory disability is due, in part, to his undisputed history of cigarette smoking.[41] However, to qualify for Black Lung benefits, the claimant need not prove that pneumoconiosis is the "sole" or "direct" cause of his respiratory disability, but rather that it has contributed to his disability. *Robinson v. Pickands Mather &*

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[39] *Hobbs v. Clinchfield Coal Co.*, 917 F.2d 790, 792 (4th Cir. 1990). Under *Robinson v. Pickands Mather & Co./Leslie Coal Co. & Director, OWCP*, 14 B.L..R 2-68 at 2-76, 914 F.2d 35 (4th Cir. 1990), the terms "due to," in the statute and regulations, means a "contributing cause," not "exclusively due to." In *Roberts v. West Virginia C.W.P. Fund & Director, OWCP*, 74 F.3d 1233 (1996 WL 13850)(4th Cir. 1996) (Unpublished), the Court stated, "So long as pneumoconiosis is a 'contributing' cause, it need not be a 'significant' or 'substantial' cause." *Id.* But see *Gross v. Dominion Coal Corp.,* 23 B.L.R. 1-8, BRB No. 03-0118 (2003), where the Board observed that "[U]nder the existing law of the Fourth Circuit, claimant is not required to establish relative degrees of causal contribution by pneumoconiosis and smoking to demonstrate that his total disability is due to pneumoconiosis. See *Robinson v. Pickands Mather & Co./Leslie Coal Co. & Director, OWCP*, 14 B.L.R. 2-68 at 2-76, 914 F.2d 35 (CA4 1990)(holding that a claimant must prove that pneumoconiosis is at least a contributing cause of total disability). Pneumoconiosis must be a necessary condition of the claimant's disability in that it cannot play a merely *de minimis* role. *Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 1196 n.8, 19 B.L.R. 2-304, 2-320 n.8 (4th Cir. 1995)."

[40] *But see*, Brian C. Murchison, Due Process, Black Lung, and the Shaping of Administrative Justice, 54 Admin. L. Rev. 1025, 1101 (2002)(…the lack of precise apportionment between concurring causes should not be fatal.")

[41] *Sewell Coal Co. v. Director, OWCP [O'Dell]* (Unpublished), 22 B.L.R. 2-213, No. 00-2253 (4th Cir. July 26, 2001)(Unpublished). "…the mere documentation of a smoking history on the official OWCP form or elsewhere, without more, cannot reasonably imply that an examining physician has 'addressed the possibility that cigarette smoking caused the claimant's disability." *Malcomb v. Island Creek Coal Co.*, 15 F.3d 364 at 371 (4th Cir. 1994).

Co./Leslie Coal Co. & Director, OWCP, 914 F.2d 35, 14 B.L.R. 2-68 (4th Cir. 1990) at 2-76. *Jones v. Badger Coal Co.*, 21 B.L.R. 1-102, BRB No. 97-1393 BLA (Nov. 30, 1998)(*en banc*). There is no requirement that doctors "specifically apportion the effects of the miner's smoking and his dust exposure in coal mine employment upon the miner's condition." *Jones v. Badger Coal Co.*, 21 B.L.R. 1-102, BRB No. 97-1393 BLA (Nov. 30, 1998)(*en banc*) *citing generally, Gorzalka v. Big Horn Coal Co.*, 16 B.L.R. 1-48 (1990). *See Consolidation Coal Co. v. Swiger*, Case No. 03-1971 (4th Cir. May 11, 2004)(Unpub.) citing with approval *Cornett v. Benham Coal, Inc*., 227 F.3d 569, Case No. 99-3469, 22 B.L.R. 2-107 (6th Cir. Sept. 7, 2000). *Consolidation Coal Co. v. Director, OWCP [Williams],* ___ F.3d ___, Case No. 05-2108 (4th Cir. July 13, 2006)(Physicians need not make "such particularized findings."(Apportioning lung impairment between smoking and coal mine dust exposure)).

None of the doctors found that the miner's respiratory impairment was "significantly contributed to by pneumoconiosis." While it was agreed the miner was totally disabled as a "whole" person, only Dr. Gaziano found a "moderate" contribution by CWP. Drs. Hippensteel and Crisalli, having not diagnosed clinical or legal CWP, found no coal mine dust induced respiratory disability. Rather, they attributed the miner's respiratory impairment to asthma and hypoxemia due to his morbid obesity.

If the claimant would have been disabled to the same degree and by the same time in his life had he never been a miner, as is the case here, then benefits cannot be awarded. *Hobbs v. Clinchfield Coal Co.*, 917 F.2d 790, 792 (4th Cir. 1990); *Robinson v. Picklands Mather & Co.*, 914 F.2d 35, 38 (4th Cir. 1990). I find the miner has failed to establish that he suffered a total respiratory disability due to coal workers' pneumoconiosis.

ATTORNEY FEES

The award of attorney's fees, under the Act, is permitted only in cases in which the claimant is found to be entitled to the receipt of benefits. Since benefits are not awarded in this case, the Act prohibits the charging of any fee to the claimant for the representation services rendered to him in pursuit of the claim.

CONCLUSIONS

In conclusion, the claimant has not established the existence of pneumoconiosis or that he was totally disabled due to pneumoconiosis. He is therefore not entitled to benefits.

ORDER[42]

It is ordered that the claim of J.N. for benefits under the Black Lung Benefits Act is hereby DENIED.

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RICHARD A. MORGAN

Administrative Law Judge

NOTICE OF APPEAL RIGHTS (Effective Jan. 19, 2001): Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board before the decision becomes final, i.e., at the expiration of thirty (30) days after "filing" (or **receipt by**) with the Division of Coal Mine Workers' Compensation, OWCP, ESA, ("DCMWC"), by filing a Notice of Appeal with the **Benefits Review Board, ATTN: Clerk of the Board, P.O. Box 37601, Washington, D.C. 20013-7601.**[43]
At the time you file an appeal with the Board, you **must also send a copy** of the appeal letter **to Donald S. Shire, Associate Solicitor, Black Lung and Longshore Legal Services, U.S. Department of Labor, 200 Constitution Ave., NW, Room N-2117, Washington, DC 20210**. *See* 20 C.F.R. § 725.481.

Your appeal is considered filed on the date it is received in the Office of the Clerk of the Board, unless the appeal is sent by mail and the Board determines that the U.S. Postal Service postmark, or other reliable evidence establishing the mailing date, may be used. *See* 20 C.F.R. § 802.207. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

After receipt of an appeal, the Board will issue a notice to all parties acknowledging receipt of the appeal and advising them as to any further action needed.

If an appeal is not timely filed with the Board, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 20 C.F.R. § 725.479(a).

E-FOIA Notice: Under e-FOIA, final agency decisions are required to be made available via telecommunications, which under current technology is accomplished by posting on an agency web site. *See* 5 U.S.C. § 552(a)(2)(E). *See also* Privacy Act of 1974; Publication of Routine Uses, 67 Fed. Reg. 16815 (2002) (DOL/OALJ-2). Although 20 C.F.R. § 725.477(b) requires decisions to contain the names of the parties, it is the policy of the Department of Labor to avoid use of the Claimant's name in case-related documents that are posted to a Department of Labor web site. Thus, the final ALJ decision will be referenced by the Claimant's initials in the caption

[42] § 725.478 Filing and service of decision and order (Change effective Jan. 19, 2001). Upon receipt of a decision and order by the DCMWC, the decision and order shall be considered to be filed in the office of the district director, and shall become effective on that date.
[43] 20 C.F.R. § 725.479 (Change effective Jan. 19, 2001). (d) Regardless of any defect in service, **actual receipt** of the decision is suffice to commence the 30-day period for requesting reconsideration or appealing the decision.

and only refer to the Claimant by the term "Claimant" in the body of the decision. If an appeal is taken to the Benefits Review Board, it will follow the same policy. This policy does not mean that the Claimant's name or the fact that the Claimant has a case pending before an ALJ is a